Supreme Court, U.S.
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No. 01-277

IN THE

Supreme Court of the United States

CARMEN LEVERETTE,

Petitioner,

v.

MARGARET BELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Rule:

United States Supreme Court Rule 10 1

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REASON FOR DENYING THE WRIT

There is no reason, much less the compelling reason required by Rule 10, for the Court to exercise its discretion to review the Fourth Circuit's decision in *Leverette v. Bell*, 247 F.3d 160 (4th Cir. 2001). Petitioner brought this suit against Respondent Bell and her employer, SCDC, alleging that Respondent Bell violated her Fourth Amendment right against unreasonable searches and seizures by performing a visual body cavity search of Petitioner's person. The sole issue before the Fourth Circuit was whether the district court properly rejected Respondent Bell's assertion of qualified immunity in response to Petitioner's allegation. The Fourth Circuit conducted a *de novo* review of the record and ruled that Respondent Bell was entitled to qualified immunity, because Petitioner's Fourth Amendment right against unreasonable search and seizure had not been violated.

Petitioner seeks review of the Fourth Circuit's decision on the premise that the Court's review will resolve an alleged conflict between the circuit courts regarding the requisite degree of suspicion necessary to engage in a visual body cavity search of a correctional officer. However, the alleged conflict exists only between the Fourth Circuit and Second Circuit, because until the Fourth Circuit rendered its decision, the issue had not been addressed by any other circuit court in the 17 years following the Second Circuit's holding in *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984). Moreover, the facts that formed the basis for the *Carey* court's decision differ in significant respects from the facts before the Fourth Circuit. In short, since the issue for which Petitioner seeks the review of this Court has been addressed by only two circuit courts in a period of 17 years and the cases are factually distinct, there is simply no basis for Petitioner's contention

that this Petition for Writ of Certiorari presents a significant conflict among the circuit courts or an important question of federal law that should be resolved by this Court. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

I. THE FOURTH CIRCUIT'S RULING SHOULD NOT BE REVIEWED, BECAUSE THE COURT'S REVIEW WILL NOT RESOLVE A SIGNIFICANT CONFLICT BETWEEN THE CIRCUIT COURTS.

Petitioner contends that the Court's review of this matter will permit the Court to resolve a conflict between the Fourth Circuit's ruling and the Second Circuit's holding in *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984). In *Carey*, the Second Circuit held that prison authorities must obtain a search warrant based on probable cause before they may perform a visual body cavity search on a correctional officer. *Carey*, 737 F.2d at 208. In contrast, the Fourth Circuit found that "prison authorities generally may conduct a visual body cavity search when they possess a reasonable and individualized suspicion that an employee is hiding contraband on his or her person." *Leverette v. Bell*, 247 F.3d 160, 168 (4th Cir. 2001). However, on the sole issue before the Fourth Circuit — whether Respondent Bell was entitled to qualified immunity — the *Carey* court, like the Fourth Circuit, found that the prison authorities who conducted the search were entitled to qualified immunity even though they had not obtained a warrant. Thus, even if the Court found in Petitioner's favor and determined that the challenged search was unconstitutional, this determination would not be dispositive of the Fourth Circuit's holding.

Petitioner's contention that a significant conflict exists between the Second and Fourth Circuits is further undermined by the factual record in *Carey*, which differed in significant

respects from the findings of fact made by the Fourth Circuit in its *de novo* review of the record. These differences are of particular importance in this matter, because an analysis of the Fourth Amendment's prohibition against unreasonable searches is inherently fact-driven. In the first instance, to determine whether a search is reasonable, the search must be viewed in the context of an individual's legitimate expectations of privacy. *Carey*, 737 F.2d at 201. The *Carey* court applied the twofold test articulated by this Court in *Katz v. United States*, 389 U.S. 347, 361 (1967), to determine if a legitimate expectation of privacy existed with respect to the challenged visual body cavity searches. Under this test, the defendant correctional officers first had to exhibit an actual (subjective) expectation of privacy. The *Carey* court found in favor of the officers on this issue, because there was no evidence in the record which would indicate that the correctional officers did not exhibit an actual subjective expectation of privacy. *Carey*, 737 F.2d at 201. Because the *Carey* court determined that the officers had an actual or subjective expectation of privacy, the court reached the second prong of the test articulated in *Katz*. Under this prong, the correctional officers had to demonstrate that their subjective expectation of privacy was one that society was prepared to recognize as reasonable. *Id.* at 201. On this point, the *Carey* court stated only that it believed society was prepared to recognize that an expectation of privacy existed with respect to the challenged searches. *Id.* at 208. The *Carey* court did not state why or upon what facts it based its opinion in this regard. However, it is indisputable that society's reasonable expectations may have changed in the 17 years that have elapsed since the Second Circuit's decision in *Carey*.

In short, Petitioner cannot dispute that the analysis employed by the *Carey* court to determine whether the challenged search was reasonable was premised on

determinations of fact. Nor can Petitioner contend that the relevant facts underlying the decision in *Carey* existed in the record before the Fourth Circuit. In fact, the Fourth Circuit expressly relied on the *Carey* decision in ruling that the search challenged by Petitioner was reasonable, at least in part because of her diminished expectations of privacy "in light of the prison's manifest interest in preventing the introduction of drugs, weapons, and other contraband." *Leverette v. Bell*, 247 F.3d 160, 168 (4th Cir. 2001) (citing *Carey*, 737 F.2d at 204). In citing to the Second Circuit's opinion in *Carey* for this proposition, the Fourth Circuit implicitly distinguished the relevant facts in its record from those found determinative by the *Carey* court. Thus the Fourth Circuit's ruling arguably stands only for the proposition that a correctional officer's actual or subjective expectation of privacy is an individualized, fact specific determination. This conclusion is borne out by the Fourth Circuit's use of the term "generally" to define when prison authorities may conduct visual body cavity searches without a warrant and its express emphasis "that reasonable suspicion is the minimum requirement, and . . . the more personal and invasive the search activities of the authorities become, the more particularized and individualized the articulated supporting information must be." *Id.*

Under the standard it articulated, the Fourth Circuit stated that it was satisfied that the challenged search was constitutional because the supporting information was particularized and individualized. Specifically, Respondent Bell received information that Petitioner would be bringing contraband into the prison in a tampon on a specific date. The information also "bore indicia of reliability," because the source providing the information had provided accurate drug-related tips in the past. *Id.* Finally, the Fourth Circuit

noted that the search itself, which was conducted by female officials in a private setting, "was administered in a sensitive and professional manner." *Id.* In contrast, the *Carey* court stated that there was no evidence in the record to indicate that contraband had ever been carried into the subject correctional facilities by correctional officers in their body cavities. *Carey*, 737 F.2d at 208. Further, the defendant correctional authorities in *Carey* had not received any particularized or individualized information regarding the correctional officers who were searched. In fact, several of the correctional officers who were searched were selected at random and others merely on the basis of hearsay and rumor. *Id.* at 195.

Despite the apparent differences between the relevant facts before the *Carey* court and those reviewed by the Fourth Circuit, in a disingenuous effort to grab the Court's attention, Petitioner falsely concludes that the Fourth Circuit's ruling "in essence" gives correctional officers "less constitutional protection than the inmates they are hired to guard." Pet. at 15. This conclusion is patently incorrect. In *Bell v. Wolfish*, 441 U.S. 520, 576-77 (1979), this Court upheld a prison's practice of conducting visual body cavity searches on inmates following every contact visit, regardless of individualized suspicion. In contrast, the Fourth Circuit expressly held that reasonable, individualized suspicion is the ***minimum*** level of suspicion necessary to conduct a visual body cavity search when the subject of the search is a correctional officer. Thus the minimum standard articulated in the Fourth Circuit's ruling clearly exceeds the standard approved by the Court for inmates.

As stated by the Fourth Circuit, "[t]he Court's decision in *Bell v. Wolfish* made clear that the 'unique security dangers'

present in correctional facilities may justify even the most intrusive searches. . . ." *Leverette*, 247 F.3d at 167. The factual context of a search is relevant, because to determine if a search is reasonable, a court ultimately must evaluate "'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" *Id.* at 166-67 (quoting *Bell v. Wolfish*, 441 U.S. at 559). The Fourth Circuit fully evaluated these factors in making its decision that the visual body cavity search of Petitioner's person constituted a "reasonable" search within the meaning of the Fourth Amendment and, upon doing so, articulated a minimum standard based on the unique and individualized facts before it. Thus any distinction between the decisions of the Fourth and Second Circuits is premised on the particular facts before each court and does not present a compelling reason for this Court's review.

II. THE FOURTH CIRCUIT'S RULING SHOULD NOT BE REVIEWED, BECAUSE THE COURT'S REVIEW WILL NOT RESOLVE AN IMPORTANT ISSUE OF FEDERAL LAW.

In addition to her contention that the challenged search was unconstitutional, Petitioner also asks the Court to review the Fourth Circuit's determination that Respondent Bell acted within the scope of her discretionary authority. However, Petitioner does not contend that her request in this regard should be granted because it presents an important question of federal law or on the basis that the Court's review would resolve an important conflict among the circuits. In fact, the Court's review would not accomplish either objective, because the asserted error consists only of alleged erroneous factual findings and the purported misapplication of a well-settled rule of law.

Petitioner disputes the Fourth Circuit's determination that Respondent Bell was acting within the scope of her discretionary authority when she conducted the visual body cavity search of Petitioner's person. Petitioner argues that Respondent Bell was not acting within the scope of her discretionary authority because SCDC's policies expressly prohibited Respondent Bell from performing the challenged search and that the Fourth Circuit improperly "ignored" these policies in making its decision. Pet. at 13. Petitioner's contention is without merit. To the contrary, the Fourth Circuit expressly found that it was "not clear" whether Respondent Bell "engaged in conduct specifically precluded by SCDC policy." *Leverette*, 247 F.3d at 165. Therefore, Petitioner's real contention is not that the Fourth Circuit ignored the potentially relevant policies, but merely that it made an erroneous finding of fact with respect to the legal import of these policies.

Pursuant to its finding that Respondent Bell acted within the scope of her discretionary authority, the Fourth Circuit then addressed the constitutionality of the challenged search. It is well settled that a government official may be "shielded from individual liability for damages arising from acts within the scope of their discretionary authority, provided that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pet. at 12 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Petitioner now disputes and seeks review of the Fourth Circuit's determination that the challenged search was constitutional on the basis that it does not comport with the Second Circuit's decision in *Carey* on this issue. Pet. at 7. However, the fact that the Fourth Circuit rendered a decision that purportedly conflicts with that of another circuit itself demonstrates that Respondent Bell's conduct did not violate a clearly established statutory or constitutional right. This is

particularly true in the instant matter, because the Fourth and Second Circuits are the only two circuits that have addressed the constitutionality of conducting a visual body cavity search of a correctional officer without a warrant. Given the dearth of legal precedent on this issue and the complete absence of binding legal precedence in the Fourth Circuit, Petitioner cannot validly claim that the challenged search violated a clearly established statutory or constitutional right. Further, as discussed in Section I, since there is no evidence that the alleged right was clearly established, even assuming *arguendo* that the challenged search was not constitutional, such a finding would not negate the Fourth Circuit's holding that Respondent Bell was entitled to qualified immunity. In light of the above, there is simply no basis for Petitioner's contention that the Fourth Circuit's decision was improper. Rather, the Fourth Circuit rendered a well-reasoned decision based on the unique and individualized facts before it.

CONCLUSION

For all of the foregoing reasons, Respondent Bell respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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